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John Peter Bragg

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FEDERAL COMMUNICATIONS COMMISSION

In Re Applications of:) MM DOCKET No.: WT 94-147
JAMES A. KAY, JR.)
License of One Hundred Fifty-)
Two Part 90 Licenses in the)
Los Angeles, California Area)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Los Angeles, California Area)

Suite A-363
FCC Portals Building
445 - 12th Street, N.W.
Washington, D.C.

Monday,
December 21, 1998

The parties met at 8:58 a.m., pursuant to the
notice of the Judge.

BEFORE: HON. JOSEPH CHACHKIN
Administrative Law Judge

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C O N T E N T S

WITNESS:

James A. Kay, Jr.

PAGE

EXAMINATION BY COUNSEL FOR THE AGENCY

857

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P R O C E E D I N G S

(8:58 a.m.)

JUDGE CHACHKIN: May I have the appearance of the parties on behalf of James A. Kay, Jr.?

MR. SHAINIS: Aaron Shainis and Robert Keller.

JUDGE CHACHKIN: And on behalf of the Wireless Telecommunications Bureau?

MR. SCHAUBLE: John Schauble and William Knowles-Kellett.

JUDGE CHACHKIN: All right. Today is the first day of taking testimony in this case, and the Bureau has the burden of proceeding, and Mr. Kay will be their first witness. Are there any preliminary matters?

MR. SCHAUBLE: Yes, Your Honor. I have several preliminary matters.

JUDGE CHACHKIN: All right. Let's begin.

MR. SCHAUBLE: First, Your Honor, the Bureau moves that Your Honor apply sequestration in this case, with the exception that sequestration not apply to the expert witnesses in this case, but that sequestration be applied to fact witnesses.

JUDGE CHACHKIN: Well, certainly Mr. Kay can be here for the entire proceeding.

MR. SCHAUBLE: Certainly, Your Honor. I don't think there is any problem since he's -- particularly since

1 he is the first witness.

2 JUDGE CHACHKIN: All right. Any objection to
3 sequestration? You understand that Mr. Kay can be here for
4 the entire proceeding.

5 MR. SHAINIS: Your Honor, let me make sure I
6 understand scope of the sequestration. I assume, then, we
7 would be prohibited from talking about Mr. Kay's testimony
8 to any subsequent witness until they have testified. Is
9 that correct?

10 JUDGE CHACHKIN: Mr. Schauble?

11 MR. SCHAUBLE: Certainly with respect to the
12 Bureau's -- certainly while the Bureau's presentation is
13 ongoing, Your Honor.

14 JUDGE CHACHKIN: I think that's true. You would
15 be prohibited from talking to any prospective witnesses as
16 to what Mr. Kay specifically testified to. Obviously, you
17 can go into those areas, but you couldn't tell the witness
18 that Mr. Kay said such-and-such, obviously.

19 MR. SHAINIS: Okay. I don't have any problem with
20 that, as long as I don't put tell the witness that this is
21 what Mr. Kay testified to.

22 JUDGE CHACHKIN: You can certainly go into the
23 areas --

24 MR. SHAINIS: Fine.

25 JUDGE CHACHKIN: -- that he testified to, but you

1 can't indicate what the nature of his testimony was.

2 MR. SHAINIS: No. I don't have any problem with
3 that.

4 JUDGE CHACHKIN: Is that what you had in mind, Mr.
5 Schauble?

6 MR. SCHAUBLE: That's perfectly acceptable to the
7 Bureau, Your Honor.

8 JUDGE CHACHKIN: Now, you said something about the
9 expert witness being here for all of the other witnesses.

10 MR. SCHAUBLE: Not being here, Your Honor. We
11 think it would be appropriate -- it may be appropriate to
12 discuss testimony with the expert witnesses.

13 JUDGE CHACHKIN: You only have one expert witness.

14 MR. SCHAUBLE: And Mr. Kay also has expert
15 witnesses, too, and the same rule would apply to --

16 MR. SHAINIS: I would have a problem with that,
17 Your Honor, unless the expert witness is going -- unless one
18 of the following events happen: Either the expert witness
19 is here to observe the witness testify and thereby to
20 testify as to an opinion relative to their testimony or the
21 expert witness is given an exact transcript of how they
22 testified if he is going to asked to do an opinion. The
23 summation type, I think, is fraught with peril. If counsel
24 tends to summarize what a witness stated without a
25 transcript, I think that's a mistake.

1 JUDGE CHACHKIN: I think I agree with that. The
2 expert witness is going to be here for the entire
3 proceeding, or at least with respect to the witness he
4 intends to comment on. Mr. Shainis indicated he has no
5 problem with that, or if he is given a transcript of the
6 witness's testimony before he comments on. Is that correct?

7 MR. SHAINIS: Yes. That is exactly correct.

8 JUDGE CHACHKIN: Now do you have any problem with
9 that?

10 MR. SCHAUBLE: Your Honor, just so I could
11 clarify --

12 JUDGE CHACHKIN: I mean, in other words, it's not
13 a situation where you tell the expert witness, you summarize
14 for them what another witness said. I think I agree with
15 Mr. Shainis that that would not be proper. If the expert
16 witness is going to comment, he should be commenting on what
17 he heard or at least what he read in the transcript, so that
18 he will have a direct quote of the transcript. Do you have
19 any problems with that?

20 MR. SCHAUBLE: So long as the transcript is
21 available, Your Honor, we have no problem.

22 JUDGE CHACHKIN: Well -- will have to be present
23 in the courtroom if he is going to comment on someone's
24 testimony.

25 MR. SCHAUBLE: Just so I'm clear, Your Honor,

1 about, about sequestration, if we wanted to have discussions
2 concerning areas and matters, we can discuss that with
3 the --

4 JUDGE CHACHKIN: The only restriction is that you
5 don't indicate what specific witness testified to. You
6 certainly could acquire into areas, find out what the
7 expert's opinion is or witnesses' testimony is with respect
8 to a certain area as long as you don't indicate to that
9 witness what some other witness testified to.

10 MR. SCHAUBLE: With respect to the expert witness,
11 Your Honor --

12 JUDGE CHACHKIN: Well, I've indicated, with
13 respect to the expert witness, he is going to comment, he is
14 going to have to be present in the courtroom when that
15 particular witness testifies, or he is going to have a copy
16 of the transcript of that of that particular witness.

17 MR. SCHAUBLE: But in the case of the expert
18 witnesses, Your Honor, just to clarify, it would be
19 permissible to show the --

20 JUDGE CHACHKIN: -- the transcript.

21 MR. SCHAUBLE: -- the transcript.

22 JUDGE CHACHKIN: Yes. That's the understanding.

23 MR. SCHAUBLE: Okay.

24 JUDGE CHACHKIN: And the same goes from Mr.
25 Shainis.

1 MR. SHAINIS: I understand.

2 JUDGE CHACHKIN: He will be able to show the
3 transcript also. What else do you want to talk about?

4 MR. SCHAUBLE: Another preliminary matter, Your
5 Honor, and this is with respect to the nature of Mr.
6 Shainis, the exhibit exchange, which is currently scheduled
7 for January 4th.

8 MR. SHAINIS: Please don't exclude Mr. Keller.

9 MR. SCHAUBLE: My apologies. Mr. Kay will be
10 exchange on that date. Am I correct, Your Honor, with the
11 understanding that to the extent Mr. Kay chooses to submit
12 testimony in writing, that January 4th is the date for him
13 to exchange that testimony in writing?

14 JUDGE CHACHKIN: Correct. If he chooses not to,
15 he can put it orally in at the time he starts his rebuttal.

16 MR. SCHAUBLE: Okay. Now, if he chooses to
17 present testimony in orally, would he be required on January
18 4th to provide the name of the witnesses and a brief summary
19 of their testimony?

20 JUDGE CHACHKIN: Well, at least he will be
21 required to provide the name of the witness and, I think, a
22 brief outline of the areas of testimony should also be
23 provided for those who are going to testify orally, you're
24 not putting anything in writing.

25 MR. SHAINIS: Your Honor, if I may comment on

1 that.

2 JUDGE CHACHKIN: Yes.

3 MR. SHAINIS: First, I'd like to ask if we can
4 change the January 4th date to January 5th.

5 JUDGE CHACHKIN: Do you have any problem with
6 that?

7 MR. SCHAUBLE: I have no objection to that, Your
8 Honor:

9 JUDGE CHACHKIN: All right, sir. January 5th.

10 MR. SHAINIS: Two, I don't have any problem with
11 providing the names of the witnesses.

12 JUDGE CHACHKIN: All right.

13 MR. SHAINIS: However, an outline of their
14 testimony --

15 JUDGE CHACHKIN: Well, let's not even require
16 that.

17 MR. SHAINIS: Okay.

18 JUDGE CHACHKIN: Just put in the issues as to
19 which they are going to testify.

20 MR. SHAINIS: All right. Let me give you an
21 example, Your Honor, just to make sure we're all on the same
22 page.

23 JUDGE CHACHKIN: All right.

24 MR. SHAINIS: If this is going to be witnesses to
25 attack the credibility of some of the Bureau's witnesses, if

1 I say their testimony would go to the credibility of the
2 Bureau's witnesses and I name the Bureau's witnesses, that's
3 probably to a large extent as I'm able to go at that point.

4 JUDGE CHACHKIN: You mean give the names of the
5 Bureau witnesses that could affect the credibility?

6 MR. SHAINIS: That's correct.

7 JUDGE CHACHKIN: Do you have anything more in mind
8 you would like to add about that? Would it be could you
9 provide the areas of the testimony that you are going to
10 attack, to the extent that you're aware of it at that point.
11 You're not being limited, but if you have generally an idea
12 that you are going to attack their credibility concerning
13 whatever.

14 MR. SHAINIS: The problem with the credibility of
15 the witness, Your Honor, is, and as I think about it, to the
16 extent that I'm able to, I will be with happy to provide it.
17 I don't know if it would be as specific as the Bureau would
18 like, though, I will attempt to do that.

19 JUDGE CHACHKIN: I'm not required to do --
20 specific, but at least provide some general so they are not
21 completely surprised. And let me say one other thing about
22 credibility. In order to attack somebody on credibility, it
23 will be necessary for you, Mr. Shainis, on cross-examination
24 to ask them questions in that area so that we don't run into
25 a situation where we don't have their testimony on the

1 record. Do you understand what I'm saying?

2 MR. SHAINIS: Yes, except the problem is, if a
3 person has a reputation in the community for deceit, lying
4 once the person takes the stand, his credibility is always
5 an issue.

6 JUDGE CHACHKIN: Well, let me put it this way. If
7 you're talking about general areas of reputation, that's one
8 thing; but if you're attacking some specific testimony.

9 MR. SHAINIS: I understand that, but now this
10 would be -- well, without letting the cat out of the bag at
11 this point, several of the Bureau's witnesses in the
12 community have a reputation for not telling the truth. That
13 would be general reputation in the community. Two, they
14 are, and we are, gathering documents now on some of the
15 witnesses to show that they have been found by other
16 agencies to have been deceitful. Now --

17 JUDGE CHACHKIN: To the extent to which you intend
18 to use such documents, it will necessary for you to confront
19 the witness with that.

20 MR. SHAINIS: That, I understand, and that's fine;
21 and that would have already been done before we present our
22 case.

23 JUDGE CHACHKIN: All right. Okay. All right.
24 Anything else?

25 MR. SCHAUBLE: Another preliminary matter, Your

1 Honor. You may recall there were certain exhibits, Exhibits
2 328 through 330, which Your Honor --

3 JUDGE CHACHKIN: Well, I'm not going to rule on
4 them. When we get to the particular witness, we'll deal
5 with that. You may cover it in examination, and it may be
6 not necessary for you to rule on it, but we'll deal with it
7 when you get to the particular witness rather than take it
8 up at this point. I guess it's Mr. Kay you're talking
9 about.

10 MR. SCHAUBLE: In part, Your Honor.

11 JUDGE CHACHKIN: And also Mr. Sobel. Right?
12 That's the testimony you're talking about.

13 I might bring up another thing. In the case of
14 Mr. Sobel, I assume we are not bringing him down here to
15 testify about things that he has already testified to.

16 MR. SCHAUBLE: Correct, Your Honor. We intend to
17 -- well, Your Honor, assuming the portions of the transcript
18 we want moved in evidence or moved in, we do not wish to
19 repeat ourselves, yeah.

20 JUDGE CHACHKIN: All right. Have you had a chance
21 to review the material that they want --

22 MR. KELLER: Yes, Your Honor.

23 JUDGE CHACHKIN: Do you have any problem with
24 that?

25 MR. KELLER: Yes, I do, Your Honor. This is --

1 JUDGE CHACHKIN: Now, let me also add this caveat.
2 You have a right to put in any additional material you want
3 to put in.

4 MR. KELLER: Well, I was going to say, as a
5 preliminary matter, Your Honor, upon reviewing the
6 transcript excerpts, I feel there are some places where
7 there were sort of selection where --

8 JUDGE CHACHKIN: Well, that's what I'm saying.

9 MR. KELLER: I'm not going to burden you with
10 that. I'll have Mr. Sobel on the stand, and if I feel we
11 need to go further, we'll just ask him about it.

12 JUDGE CHACHKIN: But if you want to put in parts
13 of the transcript which the Bureau didn't put in, you
14 certainly can.

15 MR. KELLER: But I figure if he is going to be on
16 the stand anyway, it's not that important. And I have
17 specific objections to certain sections that they've asked
18 to put in, and I don't know if you want to take that up now.
19 It's just a few limited --

20 JUDGE CHACHKIN: Well, if you can briefly tell me
21 what your objections are. I don't want to keep Mr. Kay here
22 too long.

23 MR. KELLER: I understand. Pages -- the excerpts
24 starting from page 87, line 15, through the end of page 98.
25 So, again, transcript page 87, starting at line 15, through

1 the end of page 98.

2 JUDGE CHACHKIN: Yes.

3 MR. KELLER: And page 335, line 7, through page
4 339, line 13. Your Honor, this is all testimony, and the
5 first segment is testimony by Mr. Sobel, the second segment
6 is testimony by Mr. Kay, which relates specifically to
7 Bureau Exhibits 332 through 337. That's all the testimony
8 is about which you have already excluded from evidence, and
9 I, therefore, would ask that those portions of the
10 transcript not be admitted into evidence either.

11 MR. SCHAUBLE: Your Honor, I recognize your prior
12 ruling; however, we believe that the matter -- I mean, we
13 have a misrepresentation issue where intent is important
14 here, and we also have a lack-of-candor issue in the
15 question of to what extent were disclosures made concerning
16 the relationship between Mr. Kay and Mr. Sobel, and this
17 testimony relation to a matter where --

18 JUDGE CHACHKIN: Are we talking about the Lucky,
19 whatever it is?

20 MR. SCHAUBLE: The invoices Your Honor.

21 JUDGE CHACHKIN: Oh, the invoices. What is it
22 about the invoices that you think is relevant to the
23 misrepresentations?

24 MR. SCHAUBLE: Is it relevant that a decision was
25 made in this case, Your Honor, to mask out the fact that the

1 invoices in question for Mr. Sobel's stations were coming
2 from Mr. Kay's office? And I say it's at least relevant to
3 the question of intent here.

4 Now the other thing is part of this testimony also
5 deals with the issue, the fact that Mr. Kay was preparing a
6 response to the Commission on behalf of Mr. Sobel, which I
7 think is at least relevant to the issue in this case.

8 JUDGE CHACHKIN: Well, that doesn't deal with
9 misrepresentation; that deals with one of the other issues
10 possibly, and that was the question of whether the
11 applications were really -- who was a party-in-interest, the
12 real party-in-interest. Is that what you are talking about?
13 I don't see what it has to do with the misrepresentation
14 issue.

15 MR. KELLETT: It goes to the lack of candor, Your
16 Honor. We were asking about -- at the time we were asking
17 numerous questions about his relation with Marc Sobel. He
18 operated the stations, he prepared the invoices, he prepared
19 the correspondence, and then, as he said to us, this
20 affidavit that says I have no interest in these stations.
21 We don't do business in each other's names. And it's a
22 lack-of-candor problem, not as much a blatant
23 misrepresentation.

24 JUDGE CHACHKIN: It goes to the questions of the
25 fact of control. I don't see where it's a lack of candor.

1 MR. KELLER: Your Honor, there are several other,
2 throughout other portions of the transcript where they
3 explore this very issue, where Mr. Sobel and Mr. Kay
4 testified that, yes, Mr. Kay prepared many of the FCC
5 documents, but to get it under Mr. Sobel's direction, Mr.
6 Sobel always reviewed and signed it first. We have not
7 objected to the introduction at that point.

8 This particular part that we are objecting to,
9 which is a letter that you've already ruled on, just to put
10 it in context, way back in 1993 there was an application
11 return notice sent to Mr. Sobel. What was relevant to
12 responding to those application return notices was
13 submitting some customer records demonstrating that there
14 were customers in service.

15 What was redacted from that submission was the
16 name and address the billing agent, which was Mr. Kay. Now,
17 we argued before that that information was not relevant to
18 the submission. Indeed, the Bureau at the time found it was
19 not relevant because upon receiving that submission, rather
20 than asking about the redacted material, they thereupon
21 granted the applications.

22 I just don't see that that's relevant. You have
23 already excluded the exhibits, and we're just now asking
24 that you exclude the transcript portions relating to the
25 exhibits.

1 JUDGE CHACHKIN: Well, consistent with my prior
2 ruling, I will exclude those transcript portions.

3 MR. KELLER: I have one other portion, Your Honor.
4 Page 100, line 24, through page 101, lines 17.

5 JUDGE CHACHKIN: What is this now?

6 MR. KELLER: This is page 100, line 24, through
7 page 101, line 17. That is a portion of the transcript that
8 is not testimony of the witness. It is rather a stipulation
9 by counsel, which is expressly stated to be a stipulation
10 sole for purposes of that proceeding; and, therefore, I
11 would ask that that not be admitted into the record in this
12 proceeding. If we could address the issue of whether the
13 witness can testify to that when the witness is on the stand
14 or whether counsel wishes to restipulate at that time.

15 JUDGE CHACHKIN: What's your position?

16 MR. SCHAUBLE: I guess I would ask counsel would
17 they be willing to stipulate for purposes of this proceeding
18 the facts that are contained in those transcript pages.

19 MR. KELLER: I'm not prepared to say yes or no to
20 that now, but we certainly can deal with that, and it may be
21 that you can get this evidence in through the witness, but
22 I'm not prepared to say whether we can stipulate to this
23 now. But certainly at that time we were stipulating to it
24 sole for purposes of that proceeding for expedience
25 purposes.

1 JUDGE CHACHKIN: All right. That's clear that
2 that will be stricken since there is a stipulation limited
3 to that proceeding, unless a further stipulation is now
4 reached with respect to this proceeding.

5 MR. KELLER: Other than that, we have no objection
6 to the introduction of the transcript, as redacted, by
7 agreement.

8 JUDGE CHACHKIN: Okay. Any other matters you want
9 to take up at this time?

10 MR. SCHAUBLE: Your Honor, so those portions of
11 Exhibits 328 and 329 have been, other than the parts --

12 JUDGE CHACHKIN: They will be received since there
13 is no objection, with the understanding that the other
14 parties can put in portions that they wish to put in.

15 MR. SCHAUBLE: Understood, Your Honor. Also, Your
16 Honor, there was Exhibit 330 --

17 JUDGE CHACHKIN: Yes.

18 MR. SCHAUBLE: -- which we indicated certain
19 limited portions could be placed into evidence.

20 JUDGE CHACHKIN: Let me indicate one problem I do
21 have with the portions of the transcript you want to
22 introduce. Some of them refer to exhibits, and I don't have
23 those exhibits, and someone reviewing the record will not
24 know what those exhibits are.

25 MR. SCHAUBLE: In many cases, Your Honor, the

1 exhibits are in --

2 JUDGE CHACHKIN: But they have different numbers,
3 presumably.

4 MR. SCHAUBLE: Your Honor, we can provide Your
5 Honor with a chart.

6 JUDGE CHACHKIN: Well, you're going to have to
7 provide a chart; otherwise, we won't have the exhibits, and
8 it won't make any sense in trying to review the record. So
9 you will have to provide a chart. Where we have those
10 exhibits and case where if we don't have those exhibits, you
11 will have to provide copies of them.

12 MR. SCHAUBLE: Very well, Your Honor.

13 JUDGE CHACHKIN: You're asking now about 330?

14 MR. SCHAUBLE: Yes.

15 JUDGE CHACHKIN: And what is the problem there?
16 That was corrections.

17 MR. SCHAUBLE: Corrections, Your Honor.

18 JUDGE CHACHKIN: But apparently corrections were
19 made, so what is the problem?

20 MR. SCHAUBLE: Your Honor had not admitted 330,
21 subject to checking to see whether certain portions of the
22 -- whether any of the corrections related to the portions of
23 the transcripts designated by the Bureau.

24 MR. KELLER: Your Honor, I reviewed this. Not all
25 of them, but this cover some portions that are admitted, and

1 to the extent that it corrects the transcript, no objection.

2 JUDGE CHACHKIN: All right. No problem with it,
3 then. Does that cover it all now?

4 MR. SCHAUBLE: And, finally, Your Honor, there is
5 one more, Your Honor, 343, which was the second motion to
6 enlarge, change, or delete issues --

7 JUDGE CHACHKIN: Right. You want to put in
8 evidence certain portions. You have no problem with that,
9 Mr. Keller. Is that right?

10 MR. KELLER: I'm not sure.

11 JUDGE CHACHKIN: We are talking about paragraph
12 three on page three.

13 MR. KELLER: Well, 343 was admitted, I thought;
14 342 was rejected, and 343 was admitted.

15 MR. SCHAUBLE: My recollection, Your Honor, is
16 that Your Honor asked us to designate certain portions.

17 JUDGE CHACHKIN: I think, Mr. Keller, you or Mr.
18 Shainis asked that you want torn what specific portions.

19 MR. KELLER: It was probably Mr. Shainis because
20 I'm much more cooperative than that.

21 JUDGE CHACHKIN: In any event, they provided the
22 specific pages that they are going to rely on, Mr. Shainis,
23 of the motion to enlarge, which was rather extensive, so
24 they limited it now.

25 MR. SHAINIS: No problem, Your Honor.

1 JUDGE CHACHKIN: That takes care of that. So your
2 motion will be granted. Well, it's not a motion, but in any
3 event, your request will be granted, and this material,
4 which is -- what I'll do is, at some convenient point, I'll
5 just state on the record the various pages of the exhibit
6 which have been received and which have been rejected so it
7 will be clear on the record. At some point I'll go over
8 this and recite it, but right now we have Mr. Kay, and let's
9 proceed with Mr. Kay, unless you have something else you
10 want to bring up.

11 MR. SCHAUBLE: Your Honor, that concludes my
12 preliminary matters.

13 JUDGE CHACHKIN: Mr. Shainis, you have some?

14 MR. SHAINIS: We have a few preliminary matters.

15 JUDGE CHACHKIN: All right.

16 MR. SHAINIS: The first thing deals with Mr. Kay's
17 deposition testimony.

18 JUDGE CHACHKIN: Yes.

19 MR. SHAINIS: As far as I have been able to make
20 out, it consists of four transcripts. The first two
21 transcripts -- I have a copy that I was furnished to me this
22 morning by the Bureau sending the transcripts to Mr. Kay.
23 Mr. Kay has advised me that he has never received the
24 transcripts, he has never reviewed the deposition
25 transcript, he has never looked at it. The next two

1 deposition transcripts, there is no letter ever sending that
2 to Mr. Kay.

3 Mr. Schauble has advised me this morning, and I'm
4 not trying to put words into Mr. Schauble's mouth, and he
5 showed me a statement from the reporter, which to me is
6 unintelligible, but according to Mr. Schauble, the import of
7 it is that Mr. Kay waived signature. Well, that does not
8 appear on any of the transcripts that he waived signature.
9 And Mr. Kay does not believe he ever waived signature. So
10 that's a problem with the use of the transcript because he
11 has never seen it.

12 JUDGE CHACHKIN: Well, if it becomes necessary for
13 the Bureau to use any of those portions of the transcript,
14 then we'll have to deal with it when it comes up, and Mr.
15 Kay will then review it and state whether that correctly
16 states what he said.

17 MR. SHAINIS: The next item would be the
18 statements that the Bureau took of various witnesses that
19 they are going to be using. Under the Commission's rules,
20 after that witness testifies, I'm entitled to any and all
21 statements. I have asked the Bureau if they would be
22 willing to provide those statements prior to time the
23 witness testifies, and the Bureau has indicated that their
24 policy would be consistent with the rules that they would
25 not. That is going to cause an undo you lengthening of this

1 hearing because I think, clearly, I have a right to review
2 this statement before I proceed --

3 JUDGE CHACHKIN: -- to cross-exam.

4 MR. SHAINIS: -- to cross-exam, and I think
5 theoretically, I may even want to conduct some discovery on
6 this statement. And it would ease matters tremendously if
7 the Bureau would provide those statements earlier rather
8 than later.

9 MR. SCHAUBLE: Your Honor, first of all, as Mr.
10 Shainis has noticed, pursuant to 1.362 of the rules, the
11 rule provides that the statement shall begin after the
12 witness's direct testimony. The more practical issue, Your
13 Honor, is that the rule provides that the statement or any
14 part thereof pertaining to the witness's direct testimony
15 shall be provided. There could be portions of some of these
16 statements that do not pertain to the witness's direct
17 testimony and, therefore, would not be producible.

18 JUDGE CHACHKIN: If you want to strike out the
19 portions that don't pertain to it, I guess you can. If
20 you're not going to ask any questions about that, but if you
21 do ask questions about that, you are prohibited.

22 MR. SCHAUBLE: That would have to be produced,
23 Your Honor. That would certainly be clear.

24 JUDGE CHACHKIN: Well what is your position about
25 producing in advance the statements of the witnesses which

1 you agree, under the Jinx requirement, has to be produced at
2 least after they've completed direct examination? I mean,
3 it's going to unduly delay the proceeding. Of course, Mr.
4 Shainis will be entitled the time to review their statements
5 before he begins cross-examination, and I don't think it's
6 doing the serve any purpose if you delay turning over those
7 statements.

8 MR. KELLER: Excuse me, Mr. Schauble. What's the
9 rule number?

10 MR. SCHAUBLE: It's 1.362.

11 MR. KELLER: Thank you. Hold on.

12 MR. SHAINIS: Your Honor, I have no idea how long
13 these witness statements are.

14 MR. SCHAUBLE: I think the longest one might be
15 five or six pages, as I recall.

16 JUDGE CHACHKIN: So what is your position? Will
17 you produce them in advance? When you say produce them in
18 advance, if you want to give them to Mr. Shainis three or
19 four days in advance prior to their testimony, you can do
20 that. You can stretch it out or give them all to him now,
21 but I think it's only fair and reasonable that in order to
22 conduct this hearing in an expeditious manner that Mr.
23 Shainis be given these documents prior to the witness
24 testifying so we don't have to have a long delay before you
25 engage in cross-examination.

1 MR. SCHAUBLE: Your Honor, why don't we provide
2 the statements 72 hours, three days before the witness
3 testifies, and if there is any question concerning what's --
4 you know, what specific portions may be appropriate to
5 redact, we may bring that to Your Honor's attention.

6 JUDGE CHACHKIN: All right. Bring it to my
7 attention, and I'll have to make a determination on that,
8 but 72 hours in advance should be sufficient time. As you
9 indicated, these statements are not lengthy, and that will
10 give time for Mr. Shainis to prepare for cross-examination.
11 So 72 hours for a particular witness testifies, you are to
12 provide a copy of his written statements. Understood?

13 MR. SCHAUBLE: Understood, Your Honor.

14 JUDGE CHACHKIN: All right. Mr. Shainis, that
15 will give you some advance notice.

16 MR. SHAINIS: Thank you, Your Honor.

17 JUDGE CHACHKIN: Are you ready to proceed now?
18 Any other matters before we start?

19 MR. KELLER: Just one other matter. It's more of
20 a request to the Bureau, I guess, regarding their Exhibit
21 299, which is a letter from one of their witnesses to the
22 FCC. But it makes reference that it's in response to an FCC
23 letter, and I was wondering if we could prevail upon the
24 Bureau to get a copy of the letter from the FCC to which
25 this letter is responding.

1 MR. SCHAUBLE: Your Honor, I don't believe we have
2 a copy of the responsive letters. We will double-check our
3 files, and to the extent we do have it, I don't think there
4 will be any problem making it available.

5 MR. KELLER: Well, we can't ask for any more than
6 that now, Your Honor, and assuming they do not have it, we
7 can revisit the question of whether the exhibit is
8 objectionable at that time.

9 JUDGE CHACHKIN: Well, let me make clear about
10 this redaction. What I want you to do is give Mr. Shainis
11 and Mr. Keller the statements. If you want to redacts
12 portions you can, but I want you to give me the full
13 statement so if any question comes up as to whether the
14 redaction covered any material or whether it should be
15 provided, I'll be in a position to do so.

16 MR. SCHAUBLE: Very good, Your Honor.

17 JUDGE CHACHKIN: Is that all right with you, Mr.
18 Shainis?

19 MR. SHAINIS: I don't believe so, Your Honor.

20 JUDGE CHACHKIN: You don't believe so?

21 MR. SHAINIS: No.

22 JUDGE CHACHKIN: What's the problem?

23 MR. SHAINIS: The problem is, I don't think you
24 should be given materials that I haven't seen, just on a
25 basic level --

1 JUDGE CHACHKIN: Well --

2 MR. SHAINIS: -- but let me continue. There are
3 that statement -- those statements may contain information
4 that the Bureau may want to redact that will go to the
5 credibility of these witnesses. And the Bureau should not
6 have the ability to summarily redact something that goes to
7 a witness's credibility.

8 MR. KELLETT: You're arguing against the opposite
9 point, that he should view them in camera.

10 JUDGE CHACHKIN: Well, I'm going to change my
11 rule. I want you to provide to Mr. Shainis the entire
12 statement. The if portions are irrelevant, so be it.

13 MR. KELLETT: Your Honor, these statements, Your
14 Honor, were provided in confidence with the agreement that
15 we would keep them confidence if they weren't necessarily to
16 be produced, and the rule only provides for producing
17 redacted statements.

18 JUDGE CHACHKIN: Well --

19 MR. SHAINIS: In practice, Your Honor.

20 JUDGE CHACHKIN: Well, what we are going to have
21 to do -- the only thing I can think of Mr. Shainis, is have
22 with you in the hearing room the unredacted statements, give
23 Mr. Shainis the redacted statements if you wish.

24 If Mr. Shainis wants to raise a question that
25 there might have been credibility or matters came in as a

1 result of his cross-examination, then I will review the
2 document at that time and make a determination of whether
3 Mr. Shainis is entitled to the entire document. That's the
4 only way I can see that it could be resolved. Is that
5 satisfactory? That's the only way I can see. That way, I
6 will not see the material unless a specific question comes
7 up.

8 MR. SHAINIS: I do not know how I'd even ask the
9 question if I got a redacted document. How do I ask a
10 question --

11 JUDGE CHACHKIN: I can't prevent them from not --
12 all we can do is operate on good faith.

13 MR. SHAINIS: I understand that.

14 JUDGE CHACHKIN: If the Bureau believes that some
15 matter is entirely unrelated to anything they are going to
16 ask the witness, then they would have a right to redact that
17 material. It's up to the Bureau. We have to operate on
18 good faith. If you feel on the basis of cross-examination
19 or the basis your view of the document that for some reason
20 there may be portions that the Bureau should see, then I
21 will be prepared to review that particular document and make
22 a ruling. What else can I do?

23 MR. SHAINIS: Your Honor, let me offer something
24 else, then.

25 JUDGE CHACHKIN: All right.

1 MR. SHAINIS: The reason I brought it up was
2 really to advance the ball and not to delay the hearing.
3 And I really don't want to delay the hearing. If, by the
4 same token, Your Honor, my client is being faced with a
5 revocation proceeding to take away his livelihood
6 essentially, and these charges are viewed very seriously by
7 my client, by Mr. Keller, and by me.

8 If the Bureau is going to redact -- if the Bureau
9 would agree not to redact, I would be willing to accept the
10 statement after the witness has testified, though I made
11 need some time to review it. I mean, otherwise, I will not
12 know whether the Bureau's redaction is done, and I'm not
13 casting any aspersions on the Bureau, but the Bureau may
14 redact something that they shouldn't have, but you would
15 have no way of knowing that until after I've heard the
16 witness testify.

17 MR. KELLER: Your Honor, there is an added point,
18 that the problem is some of the material may be redacted by
19 the Bureau on the theory that it's not relevant to the
20 witness's direct-case testimony simply because the Bureau
21 has intentionally limited the witness's direct-case
22 testimony, but these we've seen some of these other
23 statements for previous potential witnesses in the past.

24 They tend to be sworn statements under oath, and
25 if there is some portion that's unrelated to the witness's

1 direct-case testimony but nonetheless turns out to be a
2 false statement, and we have seen examples of that, then I
3 think that reflects on the witness's credibility. And if
4 the witness says three things in a statement and one of the
5 things is false, we should be entitled to introduce that for
6 the purpose of credibility. That's another concern that we
7 have, and that's what we meant.

8 JUDGE CHACHKIN: What is it? I don't have my --
9 with me. What is the Jinx ruling? Does it deal with
10 redaction? I don't recall it ever dealing with redaction.
11 It says copies of statements, written statements by the
12 witness shall be provided.

13 MR. SCHAUBLE: I'm reading from 1.362 of the
14 rules, Your Honor. "After a witness is called and has given
15 direct testimony in the hearing and before he is excused,
16 any party being moved for the production of any statement of
17 such witness or part thereof pertaining to his direct
18 testimony in behalf of the party calling the witness, if
19 such statement has been reduced to writing and signed or
20 otherwise approved or documented by the witness, such motion
21 shall be directed to the presiding officer. If the party
22 declines to furnish the statement, the testimony of the
23 witness pertaining to the requested statement shall be
24 stricken."

25 JUDGE CHACHKIN: Now, what kind of redaction are

1 we talking about here? Is this an extensive redaction or
2 what?

3 MR. SCHAUBLE: Your Honor, I don't have the
4 statements in front of me. We are not even certain we would
5 redact --

6 JUDGE CHACHKIN: Well, all I can say is we don't
7 even know whether there is going to be a redaction. If
8 there is a redaction, I'm prepared to rule by reviewing the
9 document to see whether it should be provided. That's all I
10 can do. There is nothing else I can do. Hopefully, there
11 won't be any redaction. Hopefully the entire statements
12 will be provided, and if there is redaction, it will be very
13 minimal.

14 I think, unless for some extraordinary reason, the
15 entire statement should be provided, whether you ask them
16 questions on direct or not, since the statement may pertain
17 to the witness's credibility, his answers to other areas,
18 which you may decide not to use because you found that it's
19 not credible. So I would say that, to the greatest extent,
20 the complete statement should be provided.

21 If it comes up a specific instance in which
22 material is redacted, then I'm prepared to rule on that, to
23 examine that particular document, which I hope will not
24 happen very frequently, and make a ruling on whether the
25 entire thing should be provided. But let's hope that there

1 is no need for redaction, that we can move along, or we'll
2 just have to wait and see what happens.

3 All right. Let's proceed. Anything further?

4 MR. KELLER: Nothing on this side, Your Honor.

5 JUDGE CHACHKIN: All right.

6 MR. SHAINIS: Your Honor, I was going to wait
7 until the end of the day. I have a problem in my office
8 that I need to address, and I'll tell you what it is. I am
9 escrow agent on a number of accounts. That money has to be
10 dispersed and only my signature will work. I cannot go to
11 the bank and be here at 9 o'clock in the morning. I was
12 going to ask if we could start tomorrow, with the
13 cooperation of -- at 10:15 or 10:30 tomorrow so that I can
14 handle the dispersement of the funds from my escrow account.

15 JUDGE CHACHKIN: Well, how many days do you plan
16 on -- do you anticipate Mr. Kay?

17 MR. SCHAUBLE: Direct testimony, Your Honor, I
18 anticipate about two days, maybe a little more.

19 JUDGE CHACHKIN: Well, Mr. Kay, I assume, will be
20 coming back, but we certainly don't want to run into a
21 problem. Do you have any problem with -- do you want to
22 start at 10, or is that too late, too early?

23 MR. SHAINIS: I would like to say 10:15, just to
24 make it safe.

25 JUDGE CHACHKIN: Is that a problem?

1 MR. SCHAUBLE: The Bureau has no objection, Your
2 Honor.

3 JUDGE CHACHKIN: All right.

4 MR. SCHAUBLE: Perhaps we could go until five.

5 JUDGE CHACHKIN: Well, I'm not saying that.

6 MR. SCHAUBLE: I was just throwing that out as a
7 suggestion, Your Honor.

8 JUDGE CHACHKIN: But I'm willing to accommodate
9 Mr. Shainis if you have no problem.

10 MR. SCHAUBLE: Thank you, Your Honor.

11 JUDGE CHACHKIN: All right. Let's proceed. Mr.
12 Kay, will you step forward. Raise your right hand.
13 Whereupon,

14 JAMES A. KAY, JR.

15 having been first duly sworn, was called as a witness herein
16 and was examined and testified as follows:

17 JUDGE CHACHKIN: Please be seated.

18 BY MR. SCHAUBLE:

19 Q Sir, could you state your name and address for the
20 record.

21 A James A. Kay, K-A-Y, Jr. My address is 15525
22 Capbritto Road in Van Nuys, California.

23 Q Good morning, Mr. Kay. Mr. Kay, I would like to
24 review a few preliminary grown rules for you before I begin
25 asking questions. Please make sure you understand the

1 question that I'm asking. If you don't understand the
2 question, please let me know. Please answer the question I
3 ask. Your counsel will have an opportunity to ask questions
4 after I'm completed asking questions.

5 Mr. Kay, are you under any medication or medical
6 condition that would prevent you from recalling facts to the
7 best of your ability today?

8 A I am under some medication, but I don't think it
9 will affect me.

10 Q Okay. Can you describe generally what sort of
11 medication it is?

12 JUDGE CHACHKIN: Well, the witness has indicated
13 it won't affect him, so we don't have to go into medication.

14 MR. SCHAUBLE: Okay.

15 BY MR. SCHAUBLE:

16 Q Is there any other reason you would be unable to
17 recall facts to the best of your ability today?

18 MR. SHAINIS: Objection. He assumes that there is
19 a reason that has already been established that --

20 JUDGE CHACHKIN: Sustained. The witness is not
21 contending that he is unable to recall facts, and for
22 purposes of this record, we will assume that he is able to
23 recall facts. There is no. There is no need to delve any
24 further.

25 MR. SCHAUBLE: Very well, Your Honor.

1 JUDGE CHACHKIN: Since the witness has not raised
2 it, there is no reason for you to raise it.

3 MR. SCHAUBLE: I just wanted to make sure --

4 JUDGE CHACHKIN: Well, let's just proceed.

5 MR. SCHAUBLE: Okay. Thank you, Your Honor.

6 BY MR. SCHAUBLE:

7 Q Mr. Kay, is it correct that you've been involved
8 professionally in the radio field since 1972 or 1973?

9 MR. SHAINIS: Your Honor, before we go much
10 further, Mr. Schauble, are you declaring Mr. Kay on the
11 record as a hostile witness so you are able to lead him?

12 JUDGE CHACHKIN: Well, he is a principal. He
13 doesn't have to declare him. Automatically, he can ask
14 leading questions. Go ahead. Do you have a question
15 outstanding?

16 MR. SCHAUBLE: Yes, Your Honor.

17 BY MR. SCHAUBLE:

18 Q Shall I repeat the question, Mr. Kay?

19 A Approximately those years. I can't say exact.

20 Q Okay. And is it correct that your first
21 professional involvement in the radio field was repairing
22 radios?

23 A Yes, I'd say so.

24 Q And is it correct that you currently provide
25 commercial, two-way radio service to customers?

1 A Yes.

2 Q And for what period of time have been providing
3 that service?

4 A I think it was around 1982 to 1984, I began
5 providing commercial service.

6 Q Okay. And are you familiar with the term
7 "repeater"?

8 A Yes.

9 Q And could you explain for the record what a
10 repeater is?

11 A A repeater is a piece of electronic hardware that
12 will receive a signal, process it through a control system,
13 and retransmit a signal.

14 Q Now, is it correct that Lucky's Two-way Radio is a
15 name you do business under?

16 A Yes.

17 Q And are you also familiar with the entity
18 Southland Communications, Inc.?

19 A Yes.

20 Q Okay. And is it correct that you are the
21 president and sole stockholder of that corporation?

22 A You have the names wrong. Southland
23 Communications, Inc., is not my company. It's a common
24 error.

25 Q Okay.

1 A You want to be precise, and you are not accurate.

2 Q Okay. For the record what is the correct --

3 A I am president of Buddy Corporation, which does
4 business under the fictitious business name Southland
5 Communications. For your information, there is another
6 Southland Communications, Inc., of which I have no
7 connection.

8 Q And is it correct that Southland -- that Buddy
9 Corp., performing business under the name Southland
10 Communications currently conducts business?

11 A Yes.

12 Q And what sort of business does that entity engage?

13 A We sell, service, install flight engineering
14 services for all types of two-way radio systems.

15 Q Okay. Now, it's correct that you also conduct
16 business under the name Lucky's Two-way Radio. Correct?

17 A Yes.

18 Q What sort of business do you conduct under the
19 name Lucky's Two-way Radio?

20 A I provide repeater services to customers and rent
21 site space, as well as provide technical consulting.

22 Q Okay.

23 A Our primary business is repeater service.

24 Q So is it correct that if you had a customer who
25 came to you and wished to provide repeater service, that it

1 would be Lucky's that would provide that repeater service?

2 A The customer would be wanting me to provide
3 service to him. That's not quite the way you worded it.

4 Q I'm sorry, Mr. Kay. Would you repeat the last
5 thing?

6 A Why don't you repeat your question? I don't think
7 you worded it quite the way you wanted it.

8 Q Okay. So it would be correct that if you -- if a
9 customer came to you to provide -- to obtain repeater
10 service, that it would be Lucky's that would provide the
11 repeater service to that customer?

12 A Yes.

13 Q Now, if you had a customer that wished to obtain
14 two-way radios from your business, is it correct that Buddy
15 Corp., doing business as Southland Communications would be
16 the entity that would sell radios to that customer?

17 A Yes.

18 Q Now, is it correct that a customer could purchase
19 radios from another dealer and receive service from Lucky's?

20 A Yes.

21 Q And conversely, is it correct that a customer
22 could purchase radios from Southland and obtain repeater
23 service from another dealer entity?

24 A Yes.

25 Q Now, Mr. Kay, are you familiar with the entity Oat

1 Trunking Group, Inc.?

2 A Yes.

3 Q Okay. And you currently have an interest in that
4 corporation?

5 A I'm the president of that company.

6 Q Okay. Are you also a stockholder in that company?

7 A Yes.

8 Q Are you currently the sole stockholder?

9 A Yes.

10 Q Now, are you familiar with an individual, Mr.
11 Vincent Cordaro?

12 A Yes.

13 Q Okay. At one time did Mr. Cordaro have a
14 relationship to that company?

15 A Yes.

16 Q And what was the nature of that relationship?

17 A I authorized him as an officer of the company.

18 Q Okay. And what office did he hold, if you recall?

19 A I think it was vice president. I'm not sure.

20 Q Okay. Do you recall the time period during which
21 Mr. Cordaro was an officer of the company?

22 A No, I don't.

23 Q Okay. Did Oat Trunking Group, Inc., ever have any
24 employees?

25 A No.

1 Q Mr. Kay, could you explain for the record your
2 understanding of the term "repeater service"?

3 MR. SHAINIS: I'll object, Your Honor, because the
4 question as worded, number one, is vague; but, number two, I
5 think Mr. Schauble earlier asked him to define repeater
6 service.

7 MR. SCHAUBLE: I asked him what a repeater was,
8 and there has been reference to the term "repeater service,"
9 and I just want the record clear as to --

10 JUDGE CHACHKIN: All right, Mr. Kay. What is a
11 repeater service? I'll overrule the objection.

12 THE WITNESS: Repeater service is the -- how do I
13 describe this? -- where we lease use of a repeater to a
14 customer for their communications system. It's basically a
15 rental of services. It would be most akin to paying a
16 cellular carrier to carry your phone messages while you own
17 the cellular phone. That's the closest I can -- those
18 terms.

19 BY MR. SCHAUBLE:

20 Q Mr. Kay, if you would turn your attention --
21 there's a couple of thick notebooks -- turn to the one that
22 says "James A. Kay Exhibits Index" and number 1 through 20.
23 And turn specifically to the first tab, WTB-1. You will see
24 a cover page.

25 A I have it.

1 Q And then you will see a document on the letterhead
2 of the Federal Communications Commission with the date stamp
3 January 31, 1994.

4 JUDGE CHACHKIN: The witness says he has it. Go
5 ahead.

6 MR. SCHAUBLE: Okay.

7 BY MR. SCHAUBLE:

8 Q Mr. Kay, is this a copy of a letter you received
9 from the Federal Communications Commission?

10 A Yes.

11 Q Okay. And you received this letter shortly after
12 January 31, 1994?

13 A Yes.

14 Q And when you received this letter, did you
15 understand that the FCC was directing you to provide the
16 information listed in this letter?

17 A Yes.

18 MR. SHAINIS: Your Honor, I'd like to make an
19 objection. No foundation has been laid that Mr. Kay
20 actually read the letter.

21 JUDGE CHACHKIN: Well, he's been asked that
22 question. He received the letter.

23 MR. SCHAUBLE: Okay.

24 JUDGE CHACHKIN: Overruled.

25 BY MR. SCHAUBLE: